DA-18

(2)

Division Bench (Criminal)

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

Criminal Appeal No. 100 /96

Post mortem Report Relevant

APPELLANT
APPLICANT :

1. Itwari Bai,
W/o Ramlal
aged 22 years

2. Bhagwati Bai,
W/o Dhanaram Dhoba,
aged about 45 years.

3. Dhanaram Dhoba,
S/o Chamar Singh,
aged about 50 years.

All are residents of
village Khamaria,
Thana Tamnar,
District: Raigarh

VERSUS

RESPONDENT :
NON-APPLICANT

State of Madhya Pradesh
through S.O. Tamnar.

CRIMINAL APPEAL UNDER SEC. 374 Cr.P.C.

Filed on 15.9.96
by Shri ... Advocate

R. to D.R.
Order 20

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मामला क्रमांक Criminal Appeal No.100/96 **सन् 200**

..... **विरुद्ध** .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Division Bench :
Hon'ble Shri Justice L.C. Bhadoo, &
Hon'ble Shri Justice J.P. Agrawal, JJ.

15/12/2005

Shri Awadh Tripathi, Counsel for the appellantss.

Shri Ashish Shukla, Additional Public Prosecutor with Shri Akhil Mishra, Panel Lawyer for the respondent/State.

Oral Judgment.

This appeal is directed against the judgment of conviction and sentence passed by the IInd Additional Sessions Judge, Raigarh, in Sessions Trial No.19/95 whereby the learned Additional Sessions Judge, after holding Itwari Bai & Bhagwati Bai guilty for commission of offence under Section 302 read with Section 34 of the I.P.C. and Dhanaram Dhoba under Section 302 of the I.P.C. sentenced each of the accused to undergo imprisonment for life.

The prosecution case, in brief, is that on 20/11/1994 at about 7.20 p.m. Ramlal quarreled with Bhagwati Bai in village Khamhariya. He asked her to allow him to see his wife (Accused Itwari Bai), on which Ujjawal Singh (since deceased) asked them that your case is pending on why you people are quarrelling, upon which Bhagwati Bai and Itwari Bai after abusing him caught hold of him. In the meantime, the other accused namely Dhanaram Dhoba came with a Tabbal (Spade) and after separating his wife

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and daughter namely Bhagwati Bai and Itwari Bai, attacked Ujjawal Singh on his neck with that Tabbal, as a result of which Ujjawal Singh died spontaneously. The matter was reported in Police Station: Tamnar, upon which the case was registered (Ex.P/3) under Section 302 of the I.P.C. The Investigating Officer took up the investigation and went to the place of occurrence. After giving notice (Ex.P/8) he prepared Panchanama (Ex.P/9) of the dead body of Ujjawal Singh and sent the same for postmortem to Primary Health Centre, Tamnar, where Dr. A.K. Mishra (PW-5) conducted the postmortem on the body of Ujjawal Singh and prepared the postmortem report (Ex.P/5). During police custody, the accused/appellant Dhanaram Dhoba gave a memorandum (Ex.P/2) regarding the place where he kept the Tabbal and the same was taken into custody under (Ex.P/1). After completion of investigation, charge-sheet was filed in the Court of Judicial Magistrate First Class, Gharghoda, who in turn committed the case to the Sessions Judge, Raigarh, from where IInd Additional Sessions Judge received the case for trial.

The prosecution in order to establish the charge against the accused/appellants examined nine witnesses. On the other hand, learned Sessions Judge recorded the statements of the accused persons under Section 313 of the Cr.P.C., in which they denied the prosecution evidence and stated they are innocent and have been

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falsely implicated in the crime, Ujjawal Singh and Ramlal assaulted them and they got themselves medically examined.

Leaned Additional Sessions Judge after hearing the arguments of learned Additional Public Prosecutor and the learned counsel for the accused/appellants, convicted and sentenced each of the accused as mentioned in paragraph one of the judgment.

We have heard Shri Awadh Tripathi, learned counsel for the accused/appellants and Shri Ashish Shukla, Additional Public Prosecutor with Shri Akhil Mishra, Panel Lawyer for the respondent/State, perused the judgment of the trial Court and the evidence available on record.

The fact of homicidal nature of death of Ujjawal Singh has not been disputed by learned counsel for the accused/appellants. Apart from that, from the evidence of eye-witnesses namely PW-1 – Ghasiyana Bai, PW/2- Sulochana and the medical evidence of PW/5- Dr. A.K. Mishra, who conducted the postmortem on the body of Ujjawal Singh and also from the postmortem report, it is established that the death of Ujjawal Singh was homicidal in nature.

Now, coming to the involvement of the accused/appellants in the crime in question, learned counsel for the accused/appellants argued that the finding of the trial Court against the accused/appellants Itwari Bai and Bhagwati Bai regarding their involvement in the crime in question and convicting them under

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Section 302 read with Section 34 of the I.P.C., is bad in law, as the same is not based on the evidence available on record.

On the other hand, Shri Ashish Shukla, Additional Public Prosecutor for the respondent/State supported the judgment of the trial Court.

In order to hold the accused guilty with the aid of Section 34 of the I.P.C., Hon'ble the Apex Court in the matter of ***Girija Shanker Vs. State of U.P., reported in 2004 AIR SCW 810*** has held that the Section 34 is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of common intention of the persons who join in committing the crime. Such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment, but it must necessarily be before the commission of the crime. The true concept of Section 34 is that if two or more persons intentionally

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do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by the same common intention in order to attract the provision. As a result of application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34 in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them.

In the light of the above principle, now we shall proceed to examine the evidence adduced by the prosecution in this case. The evidence of PW/1-Ghasiyani Bai is to the effect that Bhagwati Bai and Itwari Bai were quarrelling and Kandra i.e., Dhanaram Dhoba attacked Ujjawal Singh with Tabbal which hit on the neck of Ujjawal Singh. When she went to intervene, the Tabbal hit on her cheek. Why Kandra attacked Ujjawal Singh was not known to

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her. The evidence of PW/2 Sulochana, based on whose evidence the trial Court has convicted appellants Bhagwati Bai and Itwari Bai with the aid of Section 34 of the I.P.C., is to the effect that Bhagwati Bai and Itwari Bai both were quarrelling and on hearing the sound of quarrelling she came out. She saw that both of them caught hold of Ujjawal Singh and at that time, Dhanaram Dhoba came with Tabbal from his house and attacked Ujjawal Singh with the same which hit on the left side of neck of Ujjawal Singh, as a result of which he fell down and thereafter Dhanaram Dhoba ran away. Similar is the evidence of PW/8- Itwar Singh.

From the above evidence, it cannot be inferred that Itwari Bai and Bhagwati Bai were sharing intention with Dhanaram Dhoba regarding assault with Tabbal to cause death of Ujjawal Singh. When Itwari Bai and Bhagwati Bai were quarrelling, Ujjawal Singh (since deceased) advised them not to quarrel as the case is pending on which Itwari Bai and Bhagwati Bai caught hold of Ujjawal Singh. Till that time Dhanaram Dhoba was not in the picture. When Bhagwati Bai and Itwari Bai caught hold of Ujjawal Singh, Dhanaram Dhoba came from inside his house with Tabbal and attacked Ujjawal Singh with the same on the left side of his neck. Therefore, it cannot be said that Itwari Bai and Bhagwati Bai were sharing intention with Dhanaram Dhoba. Therefore, the finding to that effect of the trial Court making them jointly liable for commission of murder of Ujjawal Singh is not based on the

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legal evidence, therefore, the finding to that extent of the trial Court cannot be sustained.

As far as accused Dhanaram Dhoba is concerned, PW/1 Ghasiyani Bai and PW/2 - Sulochana and PW/8 - Itwar Singh have categorically stated that accused Dhanaram Dhoba came with Tabbal from his house and assaulted with that Tabbal on the left side of his neck. The Tabbal in question was recovered at the instance of accused/appellant Dhanaram Dhoba based on the information given under Section 27 of the Indian Evidence Act. Further, the evidence of the eye-witnesses stands corroborated by the medical evidence of PW/5 Dr. A.K. Mishra, who has stated that he conducted the postmortem on the body of Ujjawal Singh on 21/11/1994 and he noticed that there was incised wound below the left ear on the temporal parietal region. The injury started from the left ear was extending up to parietal region which was in the size of 2 ½" and width 5 ½" and it was deep up to the bones, mussels, vessels, nerves were cut and three cervical vertebras were also cut. Clotted blood was present and bleeding was there. Therefore, in view of the above evidence and postmortem report (Ex/P/5), the ocular evidence of the witnesses stands corroborated. Therefore, finding of the trial Court regarding the author of murder of Ujjawal Singh is based on the legal evidence and the same does not require any interference by this Court.

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Learned counsel for the accused/appellants argued that from the facts the offence against the accused/appellants does not travel beyond Section 304 Part I of the I.P.C., and further that, the accused persons were also assaulted by complaint party and that fact has been corroborated from the evidence of PW/5 Dr. A.K. Mishra and Investigating Officer.

As far as the question of causing injuries to the accused persons is concerned, from the evidence of PW/5 Dr. A.K. Mishra and Investigating Officer, it has not come on record that the accused persons had received injuries in the same incident. In the cross-examination, Dr.A.K. Mishra has stated that he had also examined the accused persons regarding the injuries and the injury report has not been adduced in evidence and placed on record. It has not been said by investigation officer that during investigation he came to the conclusion that in the same incident the accused persons received the injuries nor there is defence evidence that the accused persons received the injuries in the same incident.

From the evidence, which has been referred in the earlier part of the judgment, it is established that when accused Itwari Bai and Bhagwati Bai were quarrelling and caught hold of Ujjwal Singh, accused/appellant Dhanaram Dhoba came with Tabbal, deadly weapon and attacked the deceased on the left side of his

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neck i.e. vital part of the body, in such a manner that the injury was sufficient in the ordinary course of nature to cause death.

From the evidence of PW/5 Dr. A.K. Mishra, and the postmortem report (Ex.P/5), it is established that the mussels, nerves and vessels were cut on account of the injuries caused with Tabbal and three cervical vertebras were also cut. Therefore, in view of the above injury report also it is established that the force with which on the vital organ of the body the injury was caused by the accused, was with the intention to cause the death. PW/5 Dr. A.K. Mishra, opined that the mode of death was excessive hemorrhage leading to death caused by excessive injury on the vital portion of the head by heavy sharp edged weapon. Therefore, in view of the above fact, the conviction of accused/appellant Dhanaram Dhoba under Section 302 of the I.P.C., by the trial Court cannot be interfered with.

In the result, the appeal is partly allowed. Accused Itwari Bai and Bhagwati Bai are acquitted of the charge under Section 302 read with Section 34 of the I.P.C and the appeal of accused/appellant Dhanaram Dhoba, being devoid of merit, is dismissed.

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Raju	Shri Ashish Shukla, Additional Public Prosecutor has reported that Itwari Bai has already been released on permanent probation on 04/08/2004. Bhagwati Bai is still in custody, therefore, she be released forthwith, if not required in any other case. **Sd/-** **L.C. Bhadoo** **Judge**	**Sd/-** **V.K. Shrivatava** **Judge**